

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
**Case No. 2004B074(C)**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**LORRAINE ANGLADA-PALMA and CINDY SLADE,**

Complainants,

vs.

**DEPARTMENT OF REVENUE, MOTOR VEHICLE BUSINESS GROUP, DRIVE LICENSE SECTION,**

Respondent.

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On December 9, 200, Administrative Law Judge Mary S. McClatchey entered an order consolidating Case Numbers 2004B074 and 2004B077 herein and granting the parties' stipulated motion to vacate the hearings and submit the case for decision on the briefs. Assistant Attorney General Christian Ricciardiello represented Respondent Department of Revenue ("DOR"). Mark A. Schwane represented Complainants. The parties filed Stipulated Facts. Complainants filed their opening brief on January 5, 2004. Respondent filed its response brief on February 3, 2004.

**MATTER APPEALED**

Complainants Anglada-Palma and Slade appeal their disciplinary pay reductions in the amounts of \$265.90 and \$142.70, as violative of the Federal Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA"). They do not contest the facts giving rise to the disciplinary action.

For the reasons set forth below, Respondent's actions are **affirmed**.

**ISSUE**

1. Whether the disciplinary actions imposed by Respondent were contrary to rule or law, specifically, the FLSA.

**STIPULATIONS OF FACT**

1. Respondent imposed a disciplinary action on Complainant Anglada-Palma consisting of a two-day reduction in pay in the amount of \$265.90. On November 30, 2003, Respondent deducted this amount from her paycheck.

2. Complainant Anglada-Palma continued to work full time and was not placed on administrative leave for two days as a result of the disciplinary action.
3. Respondent imposed a disciplinary action on Complainant Slade consisting of a one-day reduction in pay in the amount of \$142.70. On November 30, 2003, Respondent deducted this amount from her paycheck.
4. Both complainants' base rate of pay remained the same, despite the disciplinary action. Anglada-Palma's monthly salary was \$2659.00. Slade's monthly salary was \$2854.00.
5. Complainants are not salary-exempt employees. They are subject to FLSA wage and hour laws.

### **DISCUSSION**

Complainants assert that Respondent has violated the FLSA's minimum wage and overtime requirements. The factual predicate of their FLSA claim is their contention that the State of Colorado pays all state employees, including Complainants, via the "fluctuating workweek" ("FWW") method. Complainants argue that the disciplinary fines violate several U.S. Department of Labor ("DOL") opinion letters interpreting the FWW method.

As a threshold matter, Complainant's case fails because the State of Colorado does not utilize the FWW method of paying its employees, including Complainants. Complainants aver the State uses FWW because it pays a fixed monthly salary for a fluctuating number of hours worked each month. However, this argument oversimplifies and mischaracterizes the FWW method.

The DOL regulations define FWW as a method of payment wherein "a fixed salary is compensation for the hours worked each week, whatever their number, rather than for working 40 hours or some other fixed weekly work period . . . " 29 C.F.R. § 778.114. They further state, "Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours. . . " *Id.*

The State utilizes the standard 40-hour workweek as the basis for calculating salaries for non-exempt hourly employees; Complainants work a 40-hour workweek. Rather than paying employees each week, however, it pays employees at the end of every month.

To facilitate paying employees monthly, the State annualizes the regular hourly rate using the following equation:

$$\text{Regular Hourly Rate} = \frac{\text{Monthly Salary} \times 12 \text{ months}}{2080 \text{ hours/year}}$$

The 2080 hours/year figure is derived from multiplying 40 hours per week by 52 weeks in a

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year. Therefore, the State's method of payment differs from the FWW method, which is used for employees who "do not customarily work a regular schedule of hours." *Id.*

FWW also differs from the State's method of payment in that it permits employers to compensate employees for overtime on a half-time basis. *See, Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 633 (5th Cir. 2001); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986) (describing the FWW method). The State compensates its employees for overtime at the traditional time-and-a-half rate for all hours over 40 worked during every workweek.

Therefore, the FWW method is not used to calculate Complainants' pay.

Complainants also argue that the disciplinary fines constituted a minimum wage violation. The FLSA requires employers to compensate employees at not less than \$5.15 per hour and not less than one and one half times the regular hourly rate for every hour worked over 40 hours per week. 29 U.S.C. §§ 206(a) and 207(a).

Complainant Anglada-Palma's regular hourly rate is \$15.34. After the disciplinary fine, it was reduced to \$13.80 for that month. Slade's regular hourly rate after her disciplinary fine of \$142.70 was \$15.64. Respondent did not commit a minimum wage violation in imposing discipline.

### **CONCLUSION OF LAW**

Respondent's actions were not contrary to rule or law.

### **ORDER**

Respondent's actions are **affirmed**.

Dated this \_\_\_\_ day of March, 2004.

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Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, Colorado 80203

### **NOTICE OF APPEAL RIGHTS**

#### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").

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2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

### **CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of March, 2004, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

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Mark A. Schwane, Esq.  
Colorado Federation of Public Employees  
1580 Logan Street, Suite 310  
Denver, Colorado 80203

and in the interagency mail, to:

Christian Ricciardiello  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods